Painters District Council No. 36 *and* Sammie L. Brown, d/b/a Brown & Co. Painting Contractor. Case 31-CB-3895

December 21, 1981

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

On June 24, 1981, Administrative Law Judge Jay R. Pollack issued the attached Decision in this proceeding. Thereafter, Respondent and the General Counsel filed exceptions and supporting briefs.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge, as modified below, and to adopt his recommended Order, as modified herein.

We agree with the Administrative Law Judge that Respondent represented, or at least showed an interest in representing, the Charging Party's employees at the time it disciplined supervisor-member Jacob Brown for working for the Charging Party, a "nonaffiliated contractor," and that the imposition of such discipline violated Section 8(b)(1)(B) of the Act because it had the reasonably foreseeable effect of interfering with the Charging Party's chosen representative for purposes of adjusting grievances.

Respondent contends that the instant case is governed by the Ninth Circuit's decision in *Chewelah Contractors*,[1] where the court found that a union does not violate Section 8(b)(1)(B) of the Act by disciplining a member who works for a nonsignatory employer if it neither represents nor shows an intent to represent the employer's employees. The Administrative Law Judge found that *Chewelah Contractors* is inapposite because Respondent's representative status was presumed to continue after the collective-bargaining agreement expired,[2] since, prior to the contract's expiration, Respondent expressed its intent to bargain with the Charging Party on an individual basis, and since Respondent did not affirmatively abandon its interest in bargaining for a new agreement as shown by its failure to respond negatively to the Charging Party's September 24 letter which granted Respondent until October 6 to request negotiations.

We agree that *Chewelah Contractors* is inapposite. We find it unnecessary, however, to rely on the Charging Party's September 24 letter as evidence of Respondent's representative intent. Instead, we find that Respondent's continuing interest in representing the Charging Party's employees is clearly shown by the series of telephone calls between the parties in July, a month after the contract expired, wherein Respondent stated that it would not dispatch workers or apprentices until the Charging Party signed a new contract. We further find that Respondent failed to present any evidence which showed that, thereafter, it abandoned its intent to continue to represent the employees. Therefore, we find, in agreement with the Administrative Law Judge, that Respondent represented or maintained an interest in representing the Charging Party's employees at the time the discipline was imposed against Brown.[3]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, Painters District Council No. 36, Los Angeles, California, its officers, agents, and representatives, shall take the action set forth in the said recommended Order, as so modified:

1. Substitute the following for paragraph 1(a):

"(a) Restraining or coercing Sammie L. Brown, d/b/a Brown & Co. Painting Contractor in the selection of its representative for the purpose of collective bargaining or the adjustment of grievances by preferring charges, holding a trial, fining, or otherwise disciplining any such representative performing supervisory, managerial, or grievance-adjustment functions for said Employer."

2. Substitute the attached notice for that of the Administrative Law Judge.

[1] *N.L.R.B.* v. *International Brotherhood of Electrical Workers, Local Union No. 73, AFL-CIO* [*Chewelah Contractors, Inc.*], 621 F.2d 1035 (9th Cir. 1980), denying enforcement of 231 NLRB 809 (1977).

[2] See *Sahara-Tahoe Corporation, d/b/a Sahara-Tahoe Hotel*, 229 NLRB 1094 (1977).

[3] *Plumbers, Steamfitters and Refrigeration Local No. 364, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL-CIO (William Stewart d/b/a West Coast Contractors)*, 254 NLRB 1123 (1981).

In finding that Respondent violated Sec. 8(b)(1)(B), Member Fanning relies upon the views set out in his separate opinion in *International Brotherhood of Electrical Workers, Local Union No. 323 (Drexel Properties, Inc.)*, 255 NLRB 1395 (1981), and he would not find that in all instances a supervisor is immune from union discipline, as suggested by the Order, as amended, in this case.

APPENDIX

NOTICE TO EMPLOYEES AND MEMBERS POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

WE WILL NOT restrain or coerce Sammie L. Brown, d/b/a Brown & Co. Painting Contractor, in the selection of its representative for the purpose of collective bargaining or the adjustment of grievances by preferring charges, holding a trial, fining, or otherwise disciplining any such representative performing supervisory, managerial, or grievance-adjustment functions for said Employer.

WE WILL NOT in any like or related manner restrain or coerce Sammie L. Brown, d/b/a Brown & Co. Painting Contractor, in the selection of its representatives for the purpose of collective bargaining or the adjustment of grievances.

WE WILL rescind and expunge from our records all disciplinary action taken against Jacob Brown, including the fines, because of his working for Sammie L. Brown, d/b/a Brown & Co. Painting Contractor, and WE WILL notify Jacob Brown, in writing, that the fines levied against him have been rescinded and that all records of disciplinary action against him have been expunged.

PAINTERS DISTRICT COUNCIL NO. 36

DECISION

STATEMENT OF THE CASE

JAY R. POLLACK, Administrative Law Judge: This matter was heard before me in Los Angeles, California, on May 7, 1981. Pursuant to a charge filed against Painters District Council No. 36 (Respondent) by Sammie L. Brown, d/b/a Brown & Co. Painting Contractor (the Charging Party),[1] on September 12, 1980,[2] the Regional Director for Region 31 of the National Labor Relations Board issued a complaint against Respondent on October 20, alleging that Respondent committed certain violations of the National Labor Relations Act, as amended (the Act). In substance, the complaint alleges that Respondent, by disciplining Jacob Brown, a supervisor employed by the Charging Party, has restrained and coerced, and is restraining and coercing, the Charging Party in the selection of its representatives for the purpose of collective bargaining or adjustment of grievances in violation of Section 8(b)(1)(B) of the Act. Respondent filed an answer denying that Jacob Brown was a supervisor and denying the commission of the alleged unfair labor practices.

Upon the entire record,[3] from my observation of the demeanor of the witnesses, and having considered the post-hearing briefs of the General Counsel and the Charging Party,[4] I make the following:

FINDINGS OF FACT AND CONCLUSIONS

I. JURISDICTION

The Charging Party is now, and has been at all times material herein, a sole proprietorship of Sammie L. Brown, with an office and principal place of business located in Los Angeles, California, where it is engaged as a painting subcontractor in the building and construction industry. During calendar year 1980, Respondent performed services in excess of $50,000 for Shirley Brothers and Goldrich & Kest, both general contractors located in California. I find that Shirley Brothers meets the Board's jurisdictional standards on a direct inflow basis by virtue of annual purchases in excess of $50,000 of materials and suppliers from suppliers located outside the State of California. I also find that Goldrich & Kest meets the Board's jurisdictional standards on a direct inflow basis by virtue of annual purchases in excess of $50,000 of materials and supplies from suppliers located outside the State of California.

Accordingly, I find that the Charging Party meets the Board's indirect outflow standard for asserting jurisdiction over a nonretail enterprise. See *Siemons Mailing Service*, 122 NLRB 81 (1958). Thus, I find that the Charging Party is an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The complaint alleges, the answer admits, and I find that Respondent is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Bargaining Relationship*

As stated above, the Charging Party is a sole proprietorship of Sammie L. Brown who normally employed eight or more journeymen painters. The parties agree that the Charging Party was bound to a collective-bargaining agreement between the Los Angeles County Painters and Decorators Contractors Association, Inc., and Respondent (including all of its affiliated local unions), which agreement was effective by its terms from July 1, 1977, until June 30, 1980 (hereinafter referred to as the 1977-80 agreement).

On January 31, 1980, Sammie L. Brown wrote the Los Angeles County Painters and Decorators Joint Committee, Inc., with a copy to Respondent, giving notice of his

[1] The name of the Charging Party appears as corrected at the hearing.

[2] Unless otherwise stated, all dates refer to calendar year 1980.

[3] On May 28, 1981, counsel for the General Counsel made a motion to correct the record. As the motion was unopposed, the corrections contained therein are hereby granted and incorporated, *sua sponte*, into the record as ALJ Exh. 1.

[4] Respondent argued orally at the hearing but did not file a brief.

intent to terminate the 1977–80 agreement as of June 30. On February 20, Ray De Namur, Respondent's executive secretary, wrote Sammie L. Brown acknowledging receipt of Brown's intent to terminate the contract and advising Brown that Respondent desired to negotiate with the Charging Party "on an individual basis prior to the expiration date of June 30." Although the Charging Party, through its attorneys, requested negotiation meetings with the Union, negotiation on a single-employer basis never commenced. On September 24, the Charging Party, through its attorney, notified Respondent's attorneys that:

> In light of the union's failure to respond to any of these requests for negotiations, the company can only assume that the union no longer wishes to represent Brown & Company's employees. Therefore, effective October 6, 1980, the company intends to implement the terms and conditions contained in the attached bargaining proposals, unless the union requests negotiations prior to that date.

Apparently, Respondent did not request negotiations with the Charging Party, nor did it respond to the letter.

B. *The Supervisory Status of Jacob Brown*

Jacob Brown is the brother of Sammie L. Brown and has been employed by the Charging Party for approximately 10 years. Jacob Brown serves as painting foreman for the Charging Party and, except for occasional visits by his brother, is the individual in charge at the jobsites. Jacob Brown's general duties are to see that the painting work is performed safely and correctly. Jacob Brown is paid $2 an hour more than the journeymen painters. During his 10 years of employment, Jacob Brown has recommended the discharge of three or four employees for inadequate performance, with the result that all such employees were discharged by Sammie L. Brown. With respect to hiring, Jacob has hired three or four applicants and rejected others, without checking with Sammie. Finally, Jacob testified that he resolves employee complaints about working conditions without checking with Sammie and that, therefore, Sammie does not have to deal with such complaints.

Based on the foregoing facts, I find that Jacob Brown is now, and has been at all times material herein, a supervisor of the Charging Party within the meaning of Section 2(11) of the Act. I further find that Jacob Brown was a natural and potential representative of the Charging Party for the purposes of collective bargaining or the adjustment of grievances within the meaning of Section 8(b)(1)(B) of the Act. See *Norwalk Typographical Union No. 529 (The Hour Publishing Co.)*, 241 NLRB 310 (1979).

C. *The Union Discipline*

Jacob Brown has been a member of affiliate local unions of Respondent for approximately 14 years. On August 20, charges were filed by Jack Mike, a business representative, against Jacob for "working for Brown & Co. Painting. A nonaffiliated contractor."[5] On August 28, Respondent notified Jacob of the charges filed against him and set a trial of the case for the evening of September 18 at Respondent's offices in Los Angeles, California. On September 9, Jacob wrote Respondent requesting the specifics of the charges against him. On September 12, Respondent, by Executive Secretary De Namur, sent Jacob copies of the notice of his alleged violations, the applicable provisions of the Union's constitution and bylaws, and the applicable contract provisions. Jacob did not attend the trial on September 18, but was notified by letter dated September 19 that he had been found guilty of the alleged violations and had been fined $600, $300 payable within 30 days and the remaining $300 suspended provided that there were no further violations for a period of 2 years. The record is silent as to whether Jacob paid any portion of the fine.

D. *Conclusions*

Section 8(b)(1)(B) of the Act provides that "it shall be an unfair labor practice for a labor organization . . . to restrain or coerce . . . an employer in the selection of his representative for the purposes of collective bargaining or the adjustment of grievances." The applicable principles of law are as follows:[6]

> Section 8(b)(1)(B) prohibits both direct union pressure—for example, strikes—to force replacement of grievance representatives and indirect union pressure—for example, union discipline of supervisor-members—which may adversely affect the chosen supervisors' performance of their representative functions. *American Broadcasting Companies* v. *Writers Guild of America, West, Inc., et al.*, 437 U.S. 411 (1976); *New Mexico District Council of the United Brotherhood of Carpenters and Joiners of America (A. S. Horner, Inc.)*, 177 NLRB 500, 502 (1969), enfd. 454 F.2d 1116 (C.A. 10, 1972); and *Wisconsin River Valley District Council of Carpenters (Skippy Enterprises Inc.)*, 218 NLRB 1063, 1064 (1975), enfd. 532 F.2d 47 (C. A. 7, 1976).
>
> It is also well settled that union discipline of supervisor members who cross a picket line or otherwise violate a union's no-work rule in order to perform their normal supervisory functions constitutes indirect union pressure within the prohibition of Section 8(b)(1)(B). In reaching this conclusion, the Board and courts have recognized that the reasonably foreseeable and intended effect of such discipline is that the supervisor-member will cease working for the duration of the dispute, thereby depriving the employer of the grievance adjustment services of his chosen representative. *American Broadcasting Companies, supra*, 437 U.S. at 433–437, note 36; *N.L.R.B.* v. *International Union of Operating Engineers, Local Union No. 501*, 580 F.2d 359, 360 (C.

[5] Jacob testified that on August 15, the date of his alleged violation, he was probably showing employees how he wanted certain items painted.

[6] As recently set forth by Administrative Law Judge Shapiro in *Plumbers, Steamfitters and Refrigeration Local No. 364 (West Coast Contractors)*, 254 NLRB 1123 (1981).

A. 9); *A. S. Horner, supra*, 177 NLRB at 502; and *Skippy Enterprises, supra*, 218 NLRB 1064, enfd. 532 F.2d at 52–53. Such discipline is unlawful even where as here the supervisor defies the union and continues to work for the employer during the dispute; the discipline is unlawful because the supervisor, having been disciplined for working during a labor dispute, may reasonably fear further discipline and hence will be deterred from working during any future disputes. The employer, in such circumstances, must either replace the disciplined supervisor or risk loss of his services during a future dispute; in either event, the employer is coerced in the selection and retention of his chosen grievance adjustment representative. *American Broadcasting Companies, supra*, 437 U.S. at 433–437.

In light of the foregoing principles, Respondent's discipline of the Charging Party's supervisor, Jacob Brown, because he worked for a nonunion employer, restrained and coerced the Charging Party in the selection and retention of its grievance adjustment representative.

Respondent, relying on the decision of the United States Court of Appeals for the Ninth Circuit in the *Chewelah Contractors* case,[7] argues that union discipline of a member who works for a nonsignatory contractor is not a violation of Section 8(b)(1)(B), even though that member is a supervisor, unless it is clear that the union's object is to influence the supervisory function.

In *Chewelah Contractors*, the court, in refusing to enforce the Board's finding of a violation of Section 8(b)(1)(B), stated that the purposes of the section were to prevent unions from forcing employers into or out of multiemployer bargaining units and to guarantee that an employer's bargaining representative would be completely faithful to the employer's desires. The court noted that, in any decision involving Section 8(b)(1)(B) that had come to its attention, the charged union had been the bargaining representative of the complaining company's employees. However, the charged union in *Chewelah Contractors* neither represented the company's employees nor demonstrated a desire to represent the employees. The court reasons that the union had no incentive to influence the company's choice of representative or affect the member's loyalty to the company. Thus, the court held that a union does not violate Section 8(b)(1)(B) by disciplining a member, even though that member is also the bargaining representative of an employer if the union neither represents nor shows an intent to represent the employer's employees.

I find that the court's opinion in *Chewelah Contractors* is inapposite because the record establishes that Respondent represented or showed an interest in representing the Charging Party's employees at the time of the subject discipline. As noted above, Respondent represented the Charging Party's employees for some time prior to the expiration of the 1977–80 agreement. At the expiration of the agreement, Respondent was presumed to be the exclusive bargaining representative of the employees. See, e.g., *Pioneer Inn Associates, d/b/a Pioneer Inn and Pioneer Inn Casino*, 228 NLRB 1263 (1977), enfd. 578 F.2d 835 (9th Cir. 1978); *Sahara-Tahoe Corporation, d/b/a Sahara-Tahoe Hotel*, 229 NLRB 1094 (1977). Further, Respondent had expressed an intent to continue representation and bargain for a contract on an individual employer basis. The record does not establish that Respondent affirmatively abandoned its intent to bargain for a new agreement for the Charging Party's employees. Rather, Respondent failed to respond to the Charging Party's correspondence which, by its terms, granted Respondent until October 6 to request negotiations. Thus, during August, when the intraunion charges were filed against Jacob Brown, and September, when the discipline was imposed, Respondent represented the Charging Party's employees or at least showed an interest in representing said employees.

Respondent argues that the General Counsel must prove that the union's object is to influence the supervisory function. However, in *Chicago Typographical Union No. 16 (Hammond Publishers, Inc.)*, 216 NLRB 903, 903–904 (1975), the Board stated that a violation of Section 8(b)(1)(B) does not turn on a determination of the motivation behind a union's act of discipline, but rather on a determination of the reasonable effect of that discipline on the supervisor's activities as an 8(b)(1)(B) representative.

The Board has continued to adhere to the reasonable effect test. See e.g., *Chewelah Contractors, supra*, 231 NLRB at 811–812; *West Coast Contractors, supra; New York Newspaper Printing Pressman's Union No. 2 (New York News, Inc.)*, 249 NLRB 1284, 1285 (1980). Applying the effect test here, I find that the reasonable and foreseeable consequences of Respondent's discipline of Jacob Brown is that the supervisor-member would cease working for his employer until a contract was signed or cease working for his employer in future disputes, thereby depriving the Charging Party of its chosen representative for the purposes of grievance adjustment. See *American Broadcasting Companies, supra*, 437 U.S. at 436, fn. 36; *N.L.R.B.* v. *International Union of Operating Engineers, Local 501, supra*, 580 F.2d at 360. Thus, I conclude that by disciplining Jacob Brown, Respondent has violated Section 8(b)(1)(B) of the Act.

IV. THE REMEDY

Having found that Respondent has engaged in unfair labor practices, I shall recommend that Respondent be ordered to cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

Upon the basis of the foregoing findings of fact and on the entire record in the case, I make the following:

CONCLUSIONS OF LAW

1. Respondent is a labor organization within the meaning of Section 2(5) and Section 8(b) of the Act.

2. The Charging Party is an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

[7] *N.L.R.B.* v. *International Brotherhood of Electrical Workers, Local Union No. 73, AFL-CIO* [*Chewelah Contractors, Inc.*], 621 F.2d 1035 (9th Cir. 1980), denying enforcement of 231 NLRB 809 (1977).

3. Jacob Brown, at all times material herein, was a supervisor for the Charging Party within the meaning of Section 2(11) of the Act and a natural and potential representative of the Charging Party for the purposes of collective bargaining or the adjustment of grievances within the meaning of Section 8(b)(1)(B) of the Act.

4. By preferring intraunion charges against Jacob Brown, holding hearing on said charges, and imposing a fine against him, Respondent restrained and coerced the Charging Party in the selection and retention of its representative for the purposes of collective bargaining and the adjustment of grievances, and thereby has engaged in and is engaging in unfair labor practices within the meaning of Section 8(b)(1)(B) of the Act.

5. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[8]

The Respondent, Painters District Council No. 36, Los Angeles, California, its officers, agents, and representatives, shall:

1. Cease and desist from:

(a) Restraining or coercing Sammie L. Brown d/b/a Brown & Co. Painting Contractor in the selection of its representative for the purpose of collective bargaining or the adjustment of grievances by preferring charges, holding a trial, fining, or otherwise disciplining any such representative for performing supervisory, managerial, or grievance adjustment functions for said Employer.

(b) In any like or related manner restraining or coercing Brown & Co. Painting Contractor in the selection of representatives for the purpose of collective bargaining or the adjustment of grievances.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Rescind and expunge from its records all disciplinary action taken against Jacob Brown, including the fines, because of his working for Brown & Co. Painting Contractor.

(b) Notify Jacob Brown, in writing, that the fines levied against him have been rescinded and all records of disciplinary action against him expunged.

(c) Post at its offices and meeting halls copies of the attached notice marked "Appendix."[9] Copies of said notice, on forms provided by the Regional Director for Region 31, after being duly signed by its authorized representative, shall be posted by said Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to members are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(d) Deliver to the Regional Director for Region 31 signed copies of said notice in sufficient number for posting by Sammie L. Brown d/b/a Brown & Co. Painting Contractor, said Employer willing, at all locations where notices to employees are customarily posted.

(e) Notify the Regional Director for Region 31, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

[8] All outstanding motions inconsistent with this recommended Order hereby are denied. In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[9] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."